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IN THE

Supreme Court of the United States

October Term, 1942, No. 882

IN THE MATTER OF JAMES AUSTIN ELLISON,

Petitioner

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT AND BRIEF IN SUPPORT THEREOF

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1942, No. ....

IN THE MATTER OF JAMES AUSTIN ELLISON, PETITIONER

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner, James Austin Ellison, respectfully presents:

I.

Summary Statement of Matter Involved

On March 6, 1942, the Grand Jury for the District Court of the United States for the District of Delaware made a presentment against your petitioner.

The presentment (R. 3) charged, among other things, that on December 10, 1941, the petitioner was subpoenaed to appear before the grand jury investigating certain offenses arising out of the Federal election of November 5, 1940; that a witness named Cann had testified perjuriously on December 9, 1941 and that petitioner while sitting in the hall outside the grand jury room endeavored to influence

Cann not to change his perjurious testimony; that petitioner appeared as a witness before the grand jury on December 11, 1941, January 14, 1942 and February 26, 1942; and that he gave "obstructive, evasive, perjurious and contumacious answers to questions propounded to him * * * and has deliberately, wilfully and contumaciously obstructed, impeded and hampered the investigation of the said Grand Jury and the administration of Justice."

A rule to show cause why the petitioner should not be adjudged in contempt of court was made returnable on March 20, 1942 (R. 3).

A motion to quash the rule was filed on behalf of the petitioner, urging, inter alia, the right to a jury trial, which motion was denied in an opinion by the Honorable Albert Watson, D. J. (R. 18). Thereafter the matter was called for hearing and on June 24, 1942 the court found petitioner guilty of contempt of court and sentenced him to a term of three months imprisonment.

An appeal was taken to the Circuit Court of Appeals for the Third Circuit and the judgment was affirmed in a per curiam opinion filed on February 15, 1943 (R. 30).

II.

Basis of Jurisdiction

The jurisdiction of this court is invoked under Section 240 of the Judicial Code, as amended by the Act of February 13, 1925, c. 229, Section 1, 43 Stat. 938 (28 U. S. C. A. 347).

III.

Questions Presented

1. Is not a defendant charged with contempt of court arising from testimony given before a grand jury at a time when the court itself was not in session, entitled to a jury trial where the proceeding is not immediately instituted and where the contempt charged also constituted separate and distinct substantive crimes?

2. May a defendant charged with substantive crimes be summarily punished for contempt of court where the alleged contempt did not occur in the actual, physical presence of the court?

3. May a defendant be summarily punished for contempt where the alleged contemptuous conduct does not disturb the order and decorum of the court so as to prevent its proceeding in the orderly dispatch of its business?

IV.

Reasons Relied On for the Allowance of the Writ

1. The basis of the District Court opinion is the case of *United States v. Pendergast*, 39 F. Supp. 189. The Government relied also on the same case which, at the time of the argument before the Circuit Court, had been affirmed by the Eighth Circuit (128 F. 2d 676). The opinion of the Third Circuit in the present case was intentionally withheld to await the decision of the Supreme Court in the *Pendergast* case to determine the scope of the case of *Nye v. United States*, 313 U. S. 33, but the decision in that

case did not pass upon the point though it was specifically raised (U. S. , 87 L. ed. 275, 278).

2. The facts charged do not constitute a contempt of court which is summarily punishable under the *Nye* decision.

3. There is now a conflict in the circuits in construing the decision of this Court in the *Nye* case.

4. The power of courts summarily to punish contempts is of grave importance and the law should be definitely settled with regard thereto.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

Opinions Below

The opinion for the Circuit Court of Appeals for the Third Circuit, filed February 15, 1943, has not yet been officially reported, but a copy is to be found in the record (R. 30). The opinions of the District Court for the District of Delaware are likewise to be found in the record (R. 18a, 24a), the opinion on the motion to quash being reported in 44 F. Supp. 375.

II.

Statement of the Case

Petitioner seeks to review the judgment of the Circuit Court of Appeals for the Third Circuit, filed February 15, 1943, affirming his conviction and sentence entered in the United States District Court for the District of Delaware on June 24, 1942 after a trial before the Honorable Albert L. Watson, sitting without a jury.

Petitioner contended throughout the proceedings that he was entitled to a trial by jury and that the court had no power to punish him summarily in that he was charged with substantive crimes.

The pertinent facts have been set forth in the foregoing petition (pp. 1-4) and will not be repeated.

III.

Argument

1. Petitioner Was Entitled to a Trial by Jury

We submit that one charged with contempt cannot be tried summarily, but has a right to a trial by jury (1) where the basis of the contempt consists of alleged perjurious and contumacious testimony given before a grand jury and of alleged subornation of perjury attempted outside the grand jury room, (2) while the court was not in session, (3) where the proceedings were not immediately instituted and where the hearing was not had until several months thereafter, (4) where the court had no personal knowledge of the situation and consequently had to take testimony to develop the facts, (5) where the alleged contempt constituted separate and distinct crimes and (6) where the misconduct, if any, did not disrupt quiet and order or actually interrupt the court in the conduct of its business.

We have found no case in which an alleged contemnor has been deprived of his basic right to a trial by jury under circumstances which even remotely approach those existing in the instant case. On the contrary, it is our position that the case of *Nye v. United States*, 313 U. S. 33, is authority in support of our contention.

In the Circuit Court, the Government cited the case of *O'Malley & Pendergast v. United States*, 128 F. 2d 676, as authority for its view that the *Nye* case was inapplicable to the present facts. The opinion of the trial judge on which the Circuit Court relied in the case at bar was based

substantially on the opinion in the same case in the lower court (39 F. Supp. 189).

Although the very point at issue herein (the scope and application of the *Nye* decision) was specifically raised in the Supreme Court in the *Pendergast* case, the Court did not pass any opinion thereon in that the point was not necessary to its decision (87 L. ed. 275, 278).

For this reason, we believe this Court should review the decision herein to determine finally the scope and meaning of the *Nye* case as applied to an alleged contempt committed outside the view of the "judicial eye". (cf. *Ex Parte Terry*, 128 U. S. 289, 312).

The proceeding against the petitioner herein was instituted under Section 268 of the Judicial Code (derived from Section 1 of the Act of March 2, 1831) which provides as follows (28 U. S. C. A. 385):

> "The said courts shall have power to impose and administer all necessary oaths, and to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance of any such officer, or by any party, juror, witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts."

The acts charged, however, fall also within certain sections of the Criminal Code, to wit, Section 125 defining perjury (18 U. S. C. A. 231), Section 126 defining subornation of perjury (18 U. S. C. A. 232) and Section 135 which provides as follows (18 U. S. C. A. 241):

"Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States Commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States Commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both."

This last quoted Section of the Criminal Code (135) was derived from Section 2 of the Act of 1831 which provides:

"That if any person or persons shall, corruptly, or by threats or force, endeavor to influence, intimidate, or impede any juror, witness, or officer, in any court of the United States, in the discharge of his duty, or shall, corruptly, or by threats or force, obstruct or impede, or endeavor to obstruct or impede the due administration of justice therein, every person or persons, so offending, shall be liable to prosecution therefor, by indictment, and shall, on conviction thereof, be punished, by fine not exceeding five hundred dollars, or by imprisonment, not exceeding three months, or both, according to the nature and aggravation of the offense."

The basic question presented is whether Section 268 of the Judicial Code may be so construed as to permit a

summary punishment for a contempt of court which consists of giving perjurious and obstructive testimony before a grand jury and attempting to suborn the perjury of a witness in a corridor directly outside the grand jury room.

The *Nye* case held that the construction of the first section of the Act of 1831 (now Section 268 of the Judicial Code) was best expressed in *Ex Parte Poulson,* (CC) Fed. Cas. No. 11,350 (1835) wherein it was held to allude "to that kind of misbehavior which is calculated to disturb the order of the court, such as noise, tumultuous or disorderly behavior, either in or so near to it as to prevent its proceeding in the orderly dispatch of its business".

The *Nye* case concluded also that "the category of criminal cases which could be tried without a jury was narrowly confined" and unless the requirements of Section 268 "are clearly satisfied an offense will be dealt with as the law deals with the run of illegal acts."

We contend that the above rules laid down in the *Nye* decision, coupled with the holding that the words "so near thereto" have a geographical connotation, make certain that the type of contempt charged herein is not summarily punishable. Despite previous decisions to the contrary, a contempt committed before a grand jury is not one in the "presence" of the court, insofar as summary punishment is concerned, since the logical requirements of the *Nye* case mean necessarily that "presence" is actual, physical presence.

It is an absurdity to talk about physical proximity to a "constructive" presence and we submit that a court may proceed to punish summarily for contempt only when it is so "present" that its order may be disturbed by "noise, tumultuous or disorderly behavior", or similar misbehavior.

The Circuit Court relied on one of its previous de-

cisions to support its ruling herein: *Camarota v. United States,* 111 F. 2d 243. There the alleged contempt was the refusal of the witness to answer questions on the ground of self-incrimination. The witness was told to appear before a district judge who had convened court in the grand jury room, and he did appear with counsel. He was told that a presentment would be filed against him and a hearing set for the following week. The presentment was filed on the next day and a hearing was held a week thereafter. He was adjudged guilty of contempt in refusing to answer the questions, and allowed one week within which to purge himself, which he refused to do and thereafter he was committed.

This case was decided before the *Nye* decision, but even so it differs fundamentally from the case at bar. In the first place, the contemnor was not charged with the commission of substantive crimes. Likewise, there was no factual dispute and the trial judge had personal knowledge of the contempt which might be said to have been committed in his actual, physical presence.

We respectfully submit that the *Camarota* case should not be held to control the case at bar, especially after the decision of this court in the *Nye* case which stands for the proposition that an act which is alleged to be contemptuous and which also constitutes a crime is not punishable unless it *clearly* is necessary "to insure order and decorum in court".

The *Nye* case has been so interpreted in several recent decisions in other Circuit Courts of Appeal. Thus, in *Wimberly v. United States,* 119 F. 2nd 713 (C. C. A. 5, 1941) it is said (1714):

> "The gist of the decision is that if the misconduct does not disrupt quiet and order or actually interrupt the court in the conduct of its business, the offender may not be summarily punished for contempt."

To the same effect are *Schmidt v. United States,* 124 F. 2d 177 (C. C. A. 6, 1941); *Gillon v. United States,* 124 F. 2d 1018 (C. C. A. 5, 1942); *McKee v. United States,* 126 F. 2d 470 (C. C. A. 6, 1942); see also *Millinocket Theatre, Inc. v. Kurson,* 39 F. Supp. 979 (D. C. Me., 1941) and the excellent dissenting opinion of Judge Riddick in *O'Malley, Pendergast et al. v. United States,* 128 F. 2d 676, wherein he said (p. 690):

> "* * * in cases in which the question is of the power of the court to punish a criminal summarily in a manner different from that commonly and ordinarily provided for criminal trials, the question of the court's power must be of the gravest importance. The gravity of the crime only adds to the gravity of the question with which the court is confronted. In the administration of justice, the courts are in duty bound to exercise the full jurisdiction conferred upon them, and equally bound not to exceed it."

We do not contend now, nor have we ever contended, that merely because a crime is charged, a court loses its power to proceed for contempt. Our point is, however, that if the alleged contempt also constitutes a crime, the court should not proceed summarily unless it is clearly necessary to preserve its order and dignity.

Conclusion

For the reasons set out above, it is respectfully submitted that this case is one which justifies the granting of a Writ of Certiorari and thereafter reviewing and reversing the adverse decision.

Respectfully submitted,

WILLIAM A. GRAY,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1942

No. 832

IN THE MATTER OF THE PRESENTMENT BY THE GRAND JURY OF WITNESS JAMES AUSTIN ELLISON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the circuit court of appeals (R. 30–31) is not yet reported. The opinion of the district court (R. 18a–23a) is reported in 44 F. Supp. 375.

JURISDICTION

The judgment of the circuit court of appeals was entered February 15, 1943 (R. 31). The petition for a writ of certiorari was filed March 17, 1943. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether Section 268 of the Judicial Code authorized the district court summarily to punish

petitioner who, as a witness under subpoena to testify before the grand jury, gave "evasive, perjurious, and contumacious answers to questions asked him."

STATUTE INVOLVED

Section 268 of the Judicial Code (28 U. S. C. 385) provides in part:

> The courts of the United States shall have power * * * to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority. Such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, * * * and the disobedience or resistance by any * * * witness, or other person to any lawful writ, process, order, rule, decree, or command of the said courts.

STATEMENT

Petitioner was adjudged guilty of contempt of court (R. 24a–25a) after trial before the District Judge on an order to show cause why judgment of contempt should not be made (R. 3a) based on presentment by the grand jury charging appellant with contumacious conduct (R. 3a–15a). He was sentenced to imprisonment for a period of three months (R. 25a). The circuit court of appeals affirmed the conviction (R. 31a).

The allegations of the presentment (R. 3a–15a) may be summarized as follows:

In December 1941, the grand jury was investigating election frauds in New Castle County, Delaware, in connection with the National Election held November 5, 1940 (R. 3a–4a). It appeared from the testimony that there had been fraud in procuring the printing by one William N. Cann, Inc., of 29,000 official ballots which were delivered to certain political headquarters and some of which were later marked outside the polling places and cast in the ballot boxes (R. 6a, 10a–12a). During the course of the investigation, William N. Cann perjuriously testified concerning the printing and delivery of the 29,000 ballots and withheld from the jury the fact that they had been printed "in response to a special order of Ellison," the petitioner (R. 12a). Cann thereafter told petitioner, who was also subpoenaed to testify before the grand jury, of his perjurious testimony, and on December 10, 1941, while Cann and petitioner "were sitting in the hall outside of the Grand Jury room, each waiting to be called as a witness," petitioner "endeavored to influence the said Cann not to change his perjurious testimony" (R. 14a). Petitioner himself appeared as a witness before the grand jury on three different occasions and "gave obstructive, evasive, perjurious and contumacious answers to questions propounded to him before this Grand Jury and has deliberately, wilfully and contumaciously obstructed, impeded, and hampered the investigation of the said Grand Jury and the administration of Justice" (R. 15a).

An order to show cause was issued on March 6, 1942 (R. 3a), and petitioner filed a motion to quash in which he urged, *inter alia,* that the charges contained in the presentment "cannot lawfully be made the subject of summary proceedings for contempt" (R. 16a–18a). A hearing was held (R. 1a, 19a) and on April 15, 1942, the court filed an opinion denying the motion (R. 18a–23a). Petitioner thereupon entered a plea of not guilty, a full hearing was had, and the District Judge found petitioner guilty, stating that he was "satisfied that the evidence shows beyond a reasonable doubt that Ellison did obstruct the administration of justice by giving evasive, perjurious, and contumacious answers to questions asked him while he was before the Grand Jury" (R. 24a–25a).[1]

ARGUMENT

Petitioner seeks reversal upon the ground that his contumacious conduct was not committed "in the presence" of the court or "so near thereto as to obstruct the administration of justice" within the meaning of Section 268 of the Judicial Code authorizing federal courts summarily to punish

[1] In neither the opinion (R. 24a) nor the judgment and commitment (R. 25a) did the trial court make any finding in respect of the charge that in the hallway of the courtroom petitioner suborned Cann to commit perjury. The *per curiam* opinion of the circuit court of appeals (R. 30–31) affirming the conviction is likewise limited to the power of the district court to punish summarily petitioner's contempt before the grand jury.

contempts of their authority (Pet. 9–10). This contention is without merit.

1. Petitioner overlooks the further provision of Section 268 authorizing district courts to punish summarily witnesses who disobey any "lawful writ, process, order, rule, decree, or command of the said courts," irrespective of where such disobedience occurs. Petitioner does not dispute that he was lawfully subpoenaed by the district court to appear before the grand jury and there to testify fully and truthfully. But when he gave "evasive perjurious and contumacious answers to questions asked him" (R. 24a, 25a), we think it is plain that petitioner disobeyed the command of the court's order quite as much as if he had failed to appear at all. As this Court said in *Blair* v. *United States,* 250 U. S. 273, 282, "the witness is bound not only to attend but to tell what he knows in answer to questions framed for the purpose of bringing out the truth of the matter under inquiry." See also *Wilson* v. *United States,* 221 U. S. 361, 385–386; *Fairfield* v. *United States,* 146 Fed. 508–509 (C. C. A. 8); *United States* v. *McGovern,* 60 F. (2d) 880, 889 (C. C. A. 2), certiorari denied, 287 U. S. 650; *United States* v. *Goldstein,* 105 F. (2d) 150 (C. C. A. 2); cf. *Blackmer* v. *United States,* 284 U. S. 421, 439–440. In this view, whether petitioner's contempt before the grand jury was committed in the "presence" of the court is immaterial, and *Nye* v. *United States,* 313 U. S. 33, upon which he relies, is inapposite.

2. Apart from petitioner's disobedience of the court's order it is well settled that "The grand jury is an appendage of the court, and proceedings before it are regarded as being in the presence of the court. Contempts occurring there are treated as taking place in the presence of the court and are included in the class referred to as 'direct contempts.'" *United States* v. *Dachis*, 36 F. (2d) 601, 602 (S. D. N. Y.); see also *Clark* v. *United States*, 289 U. S. 1, 11; *Savin, Petitioner*, 131 U. S. 267, 277; *United States* v. *Brown*, 116 F. (2d) 455 (C. C. A. 7); *Camarota* v. *United States*, 111 F. (2d) 243, 246 (C. C. A. 3), certiorari denied, 311 U. S. 651; cf. *Wilson* v. *United States*, 77 F. (2d) 236, 240–242 (C. C. A. 8), certiorari denied, 295 U. S. 759; *O'Connell* v. *United States*, 40 F. (2d) 201, 203 (C. C. A. 2), certiorari dismissed, 296 U. S. 667; *Loubriel* v. *United States*, 9 F. (2d) 807, 808–809 (C. C. A. 2). Since, therefore, petitioner's contempt was committed in the "presence" of the court, *Nye* v. *United States* is again irrelevant, for the Court was there concerned only with that class of contempts alleged to have occurred out of the presence of the court but "so near thereto as to obstruct the administration of justice."[2]

[2] Petitioner contends (Pet. 10–12) that the *Nye* case "stands for the proposition that an act which is alleged to be contemptuous and which also constitutes a crime is not punishable unless it *clearly* is necessary 'to insure order and decorum in the court.'" However, we do not believe that the *Nye* case embodies an "order and decorum" rule for criminal

Nor does the *Nye* case hold, as petitioner suggests (Pet. 10, 11, 12; see also Pet. 3), that contumacious conduct which is also criminal may be punished only after indictment and trial by jury. It is true that in discussing the history and scope of Section 2 of the Act of March 2, 1831, now Section 135 of the Criminal Code (18 U. S. C.

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contempts. Cf. *Pendergast* v. *United States*, No. 183, this Term, decided January 4, 1943. In *McKee* v. *United States*, 126 F. (2d) 470 (C. C. A. 6); *Gillon* v. *United States*, 124 F. (2d) 1018 (C. C. A. 5); *Wimberly* v. *United States*, 119 F. (2d) 713, 714 (C. C. A. 5) and *Millinocket Theatre* v. *Kurson*, 39 F. Supp. 979 (D. Me.) upon which petitioner also relies (Pet. 11–12), no part of the misconduct occurred in or near the court and thus, as the district court pointed out (R. 21a), these cases are not relevant where, as here, the contempt is committed in the presence of the court or consists of a violation of a court order. In *Schmidt* v. *United States*, 124 F. (2d) 177 (C. C. A. 6), cited by petitioner (Pet. 12), the misconduct consisted in filing certain affidavits in the clerk's office, and it was held not to be a contempt because the court was not in session. Contrary to petitioner's suggestion (Pet. 7; see also Pet. 3), it is clear that the court was "in session" in the present case when its appendage, the grand jury, duly impaneled and sworn at a regular term of court (R. 3a–4a) and acting with the aid of the process of the court (R. 14a, 15a) was in session (R. 22a). *People ex rel. Choate* v. *Barrett, Justice*, 9 N. Y. Supp. 321, 323 (1890), quoted with approval in *Wilson* v. *United States*, 77 F. (2d) 236, 241–242 (C. C. A. 8), certiorari denied, 295 U. S. 759; see also *Camarota* v. *United States*, 111 F. (2d) 243, 246 (C. C. A. 3), certiorari denied, 311 U. S. 651; *In re Hale*, 139 Fed. 496, 500 (C. C. S. D. N. Y.), affirmed *sub nom. Hale* v. *Henkel*, 201 U. S. 43; *People* v. *Parker*, 374 Ill. 524 (1940), certiorari denied, 313 U. S. 560; *In re Kelley's Estate*, 365 Ill. 174, 178, 179 (1937).

241),[3] this Court said that "meticulous regard" must be had for the right to trial by jury as to those categories of acts obstructive of the administration of justice punishable under that Section when committed neither "'in' nor 'near' to the 'presence'" of the court (313 U. S., at p. 49). But there is nothing in the opinion to suggest that this Court intended to cast doubt upon the power of judicial tribunals to punish obstructions committed in their presence or in violation of their lawful orders, where such conduct also violates the penal code. Cf. *Clark* v. *United States,* 289 U. S. 1, 10–12; *O'Connell* v. *United States,* 40 F. (2d) 201, 204–205 (C. C. A. 2), certiorari dismissed, 296 U. S. 667. On the contrary, this Court took

[3] Section 135 of the Criminal Code (18 U. S. C. 241) provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or officer acting as such commissioner, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

pains to point out that "It has been held that an act of misbehavior though covered by the latter provisions [sec. 135, Criminal Code] may also be a contempt if committed in the 'presence' of the Court. *Savin, Petitioner, supra* [131 U. S. 267]. And see *Sinclair* v. *United States,* 279 U. S. 749."

CONCLUSION

The decision below is correct, and there is involved no conflict of decisions or any question of general importance. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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APRIL 1943.

U. S. GOVERNMENT PRINTING OFFICE: 1943